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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,)
)
) DOCKET NO. 5:23-CR-21-FL-RN
Plaintiff,)
)
vs.)
)
CARLOS ALSTON,)
)
Defendant.)

TRANSCRIPT OF HEARING ON MOTION TO DISMISS INDICTMENT
BEFORE MAGISTRATE JUDGE ROBERT T. NUMBERS, II
WEDNESDAY, MAY 31, 2023; 1:37 PM
RALEIGH, NORTH CAROLINA

FOR THE PLAINTIFF:
United States Attorney's Office - EDNC
By: Sarah E. Nokes, AUSA
150 Fayetteville Street
Suite 2100
Raleigh, NC 27601

FOR THE DEFENDANT:
Federal Public Defender's Office
By: Edward D. Gray, Esq.
150 Fayetteville Street
Suite 450
Raleigh, NC 27601

Audio Operator: Clerk's Office Personnel

eScribers, LLC
7227 N. 16th Street
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1 P R O C E E D I N G S

2 THE CLERK: All rise. This Court is now in session.
3 Honorable Judge Robert T. Numbers, II presiding. Be seated
4 and come to order.

5 THE COURT: Good afternoon, everyone.

6 THE CLERK: Good afternoon, Judge.

7 MR. GRAY: Afternoon, Your Honor.

8 MS. NOKES: Good afternoon.

9 THE COURT: We're here in the United States District
10 Court for the Eastern District of North Carolina sitting in
11 Raleigh for a hearing in the case of United States v, Carlos
12 Alston, case 523-CR-21.

13 I'd like to begin by asking counsel to identify
14 themselves for the record, beginning with counsel for the
15 United States.

16 MR. GRAY: Sarah Nokes, Your Honor, on behalf of the
17 United States. This is John Gibbons. He is in our appellate
18 division, also on behalf of the United States.

19 THE COURT: Good afternoon.

20 MR. GRAY: Edward Gray, Assistant Federal Public
21 Defender on behalf of Mr. Alston.

22 THE COURT: Good afternoon, Counsel.

23 UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

24 THE COURT: And I'll note for the record Mr. Alston
25 is present as well. So Mr. Alston has filed a motion seeking

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1 to dismiss his indictment on the argument, more or less that
2 if the Supreme Court's Bruen decision last term the Second
3 Amendment to the Constitution prohibits the United States from
4 pursuing these charges against him. I appreciate the briefing
5 from the parties on the issue of fraud. I appreciate the
6 briefing on the 925 issue as well.

7 This is obviously Mr. Alston's motion, but under
8 Bruen the government has the burden here. So Ms. Nokes, I'm
9 happy to hear from you first.

10 MS. NOKES: Thank Your Honor. The government has its
11 agent here if the Court needs to hear the facts that underlie
12 the indictment. Otherwise, I think both parties' briefs set
13 forth the facts pretty similarly. If the Court is satisfied
14 with that, then we'll just move to the substance of the Bruen
15 argument.

16 THE COURT: I think moving to the substance is fine.

17 MS. NOKES: Okay. Thank you. Your Honor, before we
18 embark on the historical analysis that is contemplated by
19 Bruen, that sort of sea change that came about by Bruen, the
20 Court has to answer a threshold question, which is, is this
21 defendant and his conduct covered by the Second Amendment. So
22 in Heller, the Supreme Court held that the Second Amendment
23 protects the right of law-abiding, responsible citizens to use
24 arms in defense of hearth and home. And this question -- this
25 threshold question of whether the defendant and his conduct

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1 are covered by the Second Amendment is still part of the
2 analysis post-Bruen. So --

3 THE COURT: You said -- you mentioned that there are
4 two things, whether the defendant's covered and whether his
5 conduct is covered. I think those are two separate questions
6 that I hope you address individually.

7 MS. NOKES: Sure. Certainly, Your Honor. So let's
8 turn first to the question of person. Is Mr. Alston a person
9 who is protected by the Second Amendment? The Bruen court
10 addressed that question in the Bruen decision, talked about
11 the fact that the petitioners in that case were ordinary, law-
12 abiding citizens, and moved on pretty quickly to the
13 historical analysis. So the language stressing that the
14 Second Amendment is enjoyed by a law-abiding citizen is in the
15 majority opinion. It's also stressed in Justice Alito and
16 Justice Kavanaugh. It's a -- which was joined by Justice
17 Roberts' concurrences that the point is that the Second
18 Amendment applies to law-abiding, responsible citizens. There
19 would be no majority without that language.

20 THE COURT: Well, so is the position here -- well,
21 your position is that the defendant is excluded from the
22 Second Amendment because he is not a law-abiding individual.
23 I'll accept that for the sake of argument that -- the nonlaw-
24 abiding portion of this. I guess my question is in Heller and
25 Bruen -- I mean, I certainly do say that the Second Amendment

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1 applies to law-abiding individuals. And what I'm trying to
2 figure out is at any point did they say that it does not apply
3 to anyone other than law-abiding individuals?

4 MS. NOKES: Your Honor, in both Heller and Bruen, the
5 Court cites with approbation restrictions on felons, for
6 example, and the mentally ill. And the Court does not -- of
7 course, in Bruen, the Court said that the means end scrutiny
8 that the circuits had been applying post-Heller was bunk, that
9 they weren't going to do that anymore. But the Court did not
10 say that we were not to consider this threshold question of
11 whether this individual before the Court is someone who was
12 covered by the Second Amendment. And in fact, the Court in
13 Bruen specifically addresses that before moving on, like I
14 said, pretty quickly to the historical analysis, because in
15 the Bruen decision, there's no question that the two
16 petitioners before the Court were just ordinary, law-abiding
17 folks.

18 THE COURT: Well, right. So I guess that's kind of
19 the point. And interestingly, as you get into more of the
20 nuance of the Second Amendment questions, you see that Bruen
21 and Heller perhaps weren't the most complicated cases from a
22 historical standpoint. These are much stickier issues. My
23 concern is that the government in this case, and in others,
24 puts a lot of weight on the recitation of the fact that the
25 Second Amendment applies to law-abiding citizens. And I

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1 don't quibble with that point. What I'm trying to figure out
2 is, is that where it stops? And if so, what is the
3 justification for saying it stops with law-abiding citizens?

4 MS. NOKES: Your Honor, so in post-Heller decisions,
5 the Fourth Circuit actually addressed this question, right?
6 So applying the Chester framework post-Heller, the Fourth
7 Circuit said that the first question that needed to be
8 answered was, was the defendant or petitioner a part of "the
9 people" that is covered by the Second Amendment? And
10 defendant has made an impassioned argument in the motion to
11 dismiss that's supported largely by dissenting opinions from
12 Judge, now Justice, Barrett and Cantor (ph.) and Judge Bevis
13 (ph.) and Fullytar (ph.) and some case law from other circuits
14 talking about how the Court shouldn't carve out individuals
15 from the Second Amendment's guarantee. But in this circuit --
16 in the Fourth Circuit and precedent that is binding on this
17 Court, that is what the Fourth Circuit has done.

18 THE COURT: Hasn't the Fourth Circuit just punted on
19 the question each time and assumed for the sake of argument
20 that the person is subject to Second Amendment?

21 MS. NOKES: I assume you're talking about Carter.

22 THE COURT: Every case that I've read, and maybe you
23 can point me to it, where they've said that -- made the point
24 that you're making.

25 MS. NOKES: Right. So in Carter, they did punt on

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1 this question. Carter was a case looking at 18 U.S.C.
2 922(g)(3), the drug user and possession statute that is before
3 the Court today. And they did punt on the issue there. They
4 talk about how Carter was not a law-abiding citizen. In fact,
5 they said that Carter or drug users like him flunk that test.
6 But what the Court said in Carter was, listen, we don't
7 actually have to decide that the Second Amendment doesn't
8 apply to this drug user because we're going to apply a means
9 and scrutiny test. And every circuit who has applied a means
10 and scrutiny test has decided that this statute is a-okay.

11 So in the first Carter decision, they sent the case
12 back to the district courts for some additional findings so
13 that then they could apply that means and scrutiny and do what
14 their sister circuits had done and find that based on that
15 scrutiny, the statute was okay. But the Fourth Circuit
16 distinctly said that a drug user is not someone who is law-
17 abiding and that that person flunks that test. But in --

18 THE COURT: So hold on -- okay.

19 MS. NOKES: Go ahead.

20 THE COURT: Sorry. Go ahead.

21 MS. NOKES: Carpio-Leon, the Fourth Circuit found
22 that the Second Amendment's protections do not extend to
23 illegal aliens because they're not law-abiding members of the
24 political community.

25 THE COURT: But I think that's an important

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1 distinction, right? Because this -- there's this question
2 that "the people" who are subject to the Second Amendment are
3 the political community, and that's not been fleshed out. But
4 it's a -- you have a harder argument if you're not a citizen
5 that you're part of the political community than if you're a
6 citizen who happens to have committed crimes.

7 MS. NOKES: See, I don't think we pull noncitizens
8 out of other Bill of Rights guarantees, right? Like, a
9 noncitizen driving down the road does not have no Fourth
10 Amendment right a reasonable stop or an -- right, against an
11 unreasonable stop just because they're a noncitizen. I don't
12 think that the fact that that person's not a citizen is the
13 deciding factor here. I mean, the courts could have said that
14 as a non-citizen, he's not a part of the political community,
15 he's not part of "the people" that are covered by the Second
16 Amendment, but the Court specifically pressed on the law-
17 abiding issue, says he's not -- a noncitizen is not a law-
18 abiding member of the political community.

19 THE COURT: All right.

20 MS. NOKES: The Court --

21 THE COURT: I mean, that's also, I think, factually
22 correct, right? I mean, if you're not -- if you are
23 illegal -- if it's illegal for you to be present in this
24 country, then you're not law-abiding. So you would be -- yes,
25 you would not be a law-abiding member of the political

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1 community. But I don't know how that answers this question.

2 MS. NOKES: Right. Well, because someone who's a
3 chronic drug user is not a law-abiding member of our political
4 community.

5 THE COURT: Okay.

6 MS. NOKES: So --

7 THE COURT: Let's assume I accept that.

8 MS. NOKES: Okay.

9 THE COURT: Okay? Where do you draw the line? If I
10 drive seventy-five miles per hour on 540 on my way home today,
11 I'm not a law-abiding individual. So do I then lose my Second
12 Amendment rights?

13 MS. NOKES: There is no statute that would take your
14 Second Amendment rights away in that circumstance.

15 THE COURT: Could Congress -- does Congress have the
16 power to take away my Second Amendment rights if I speed on my
17 way home from work?

18 MS. NOKES: Your Honor, there is no similar situation
19 to that. I mean, the statutes that we have that take away
20 Second Amendment rights take them away for very serious
21 reasons. I mean --

22 THE COURT: But --

23 MS. NOKES: -- a drug user who uses drugs just once,
24 someone who smokes one blunt, is not subject to (g) (3)'s
25 prohibitions. The statute requires the kind of regular,

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1 chronic drug use, recency of drug use, that sort of thing.

2 THE COURT: Okay. I speed home on 540 and I crash my
3 car and kill some innocent individuals. Does Congress then
4 have the power to take away my Second Amendment rights?

5 MS. NOKES: Once you're indicted for, I guess,
6 involuntary manslaughter, at that point, then yes.

7 THE COURT: So any person charged with -- Congress
8 has the authority to make it a federal crime to have every
9 person charged with involuntary manslaughter barred from
10 possession a firearm?

11 MS. NOKES: Yes.

12 THE COURT: Okay. Well, we're getting a better feel,
13 but I don't know if it's historical basis for that, but --
14 there weren't cars back then, either. But I guess I'm
15 trying -- what's the line that is drawn? Anyone who breaks
16 any law, Congress can prohibit them from possessing a firearm?

17 MS. NOKES: Your Honor, the statutes as it's written
18 are that somebody who's under indictment for a felony is not a
19 law-abiding citizen or someone who has been convicted of a
20 felony previously, not a law-abiding citizen. They are not
21 covered by, as the Fourth Circuit said in Moore and Pruiss
22 (ph.), the core Second Amendment right. So if you've been
23 convicted of a felony, if you've been convicted of
24 manslaughter, no, you are not covered by the Second Amendment.

25 THE COURT: What if I'm convicted of DWI?

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1 MS. NOKES: That's a misdemeanor offense, and you
2 wouldn't have the indictment prohibition. You wouldn't have
3 the felon in possession prohibition. You'd still have your
4 right to possess a firearm.

5 THE COURT: What we're looking at here is
6 governmental power, right? The Second Amendment restricts
7 governmental power. Does the government have the power to bar
8 everyone who is charged with DWI from possessing a firearm? I
9 mean, that's -- I'm trying to find a line drawn here what
10 makes someone -- to exclude them from the Second Amendment,
11 right? Because you're saying by being nonlaw-abiding, you are
12 not entitled to the Second Amendment's protection at all. So
13 how do we draw the line between where someone loses those
14 protections and where they don't?

15 MS. NOKES: Well, I think Congress has reasonably
16 drawn that line at the commission of a felony or pending
17 indictment for an alleged commission of a felony.

18 THE COURT: Okay. But how -- I mean, the Second
19 Amendment takes certain policy choices away from Congress.
20 How do we draw the Constitutional line of where the Second
21 Amendment allows it and where the Second Amendment doesn't
22 allow it?

23 MS. NOKES: Your Honor, that seems like a pretty
24 bright line rule to me, misdemeanor conduct versus felony
25 conduct. For a felony, you can be imprisoned for a term

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1 exceeding one year. For a misdemeanor that's not the case.
2 You could be jailed for a term up to twelve months, right?
3 The Congress has decided that people who are not law-abiding
4 include those who have committed these serious crimes, who
5 have alleged to have committed these serious crimes. And I
6 think that the fact that nonlaw-abiding citizens are not
7 covered by the Second Amendment is pretty clear throughout
8 both Heller's and Bruen's opinions.

9 THE COURT: So Congress has the ability to determine
10 who is entitled to Second Amendment rights is what you're
11 telling me?

12 MS. NOKES: So Congress has the ability to make
13 statutes that reflect who is covered by the Second Amendment,
14 and the court has told us that the Second Amendment covers
15 those who are law-abiding.

16 THE COURT: Because I mean, if you look back at the
17 debates on the Second Amendment, even Elbridge Gerry was
18 opposed to some of the proposed language of the Second
19 Amendment because it allowed Congress to exclude religious
20 objectors, and there was a lot of upset because the feeling
21 was Congress may then say, well, everyone's a conscientious
22 objector and therefore no one has a right to the gun. So
23 there are concerns here over the power of government to, by
24 passing a law exclude a giant portion of the population, or a
25 substantial portion of population, from the Second Amendment's

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1 protections just writ large. But I hear your point on this,
2 so you can move on, if you like, or if it's anything else on
3 this point you'd like to --

4 MS. NOKES: Well, like, Your Honor, I'd just like to,
5 again, push on the fact that in in both Heller and Bruen, the
6 majority opinions and concurrences talk about how the Court is
7 not casting doubt on the fact that felons are constitutionally
8 prohibited from possessing firearms. So the Court is saying
9 that these folks who are not law-abiding, who have been
10 convicted of felonies, it's absolutely okay to
11 constitutionally prohibit them from possessing firearms.

12 THE COURT: Mr. Alston's not charged with being a
13 felon in possession of a firearm, is he?

14 MS. NOKES: Right. You're absolutely right. I'm
15 just pressing on your law-abiding issue and saying what the
16 Court has said, that at least as to felons, that's perfectly
17 okay.

18 THE COURT: And if we're looking at historical
19 tradition on this point, were there exclusions from the right
20 to -- from bear arms -- kind of a complete exclusion from the
21 political community or from the Second Amendment's protections
22 on this sort of basis that you've identified?

23 MS. NOKES: Your Honor, I would argue that statutes
24 that precluded people from possessing firearms because they
25 would not swear a loyalty oath to the country, they were

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1 disloyal people, they could be dispossessed of their guns, and
2 that that is similar. They're not -- I mean, that's even --
3 that's sort of less onerous than a restriction on -- or less
4 serious than a restriction on someone who's got a felony
5 conviction or is under felony indictment or is a chronic,
6 absolute person who dismisses the law regarding controlled
7 substances. I mean, this is just somebody who won't swear an
8 oath of loyalty to the country and they dispossess them of
9 their gun rights.

10 THE COURT: So this is a bit of a nuanced point, and
11 it came up in then Judge Barrett's concurrence. What we're
12 talking about there is those people still have Second
13 Amendment rights, the -- I mean, it was all the grounds we
14 find abhorrent today, right? It was Indians and -- or Native
15 Americans and they referred to them as Indians, Catholics, and
16 enslaved people, right? Those are the folks who weren't
17 allowed to have guns because they were considered dangerous or
18 whatever. But as you noted, there are exemptions to that
19 disqualification for many of those groups by swearing a
20 loyalty oath and other disqualifications over time had -- the
21 disqualification ran out or could be cured.

22 So -- and this was Judge Barrett's point that she
23 made in her dissent was that, one, we're talking people who
24 don't -- who lose their Second Amendment rights entirely and
25 have none of them. The other one -- the other thing we're

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1 talking about is whether folks have these rights, but Congress
2 has the ability to restrict them in a certain way. And those
3 are two slightly different things. And so I just want to make
4 sure we're kind of focusing on the right things here.

5 MS. NOKES: Right. Your Honor, I would agree with
6 that. I would say that we still have to answer this threshold
7 question of whether the defendant is someone who's covered by
8 the Second Amendment. And the government's position is that
9 he is not so long as he's a chronic drug user, so long as that
10 recency of drug use, that regularity of drug use apply. And
11 he's not as long as he's under felony indictment. Now, this
12 pushes on an interesting point with respect to these two
13 statutes, which is that both of them are temporary
14 restrictions, right, and that the defendant has at least some
15 of the ability to gain his rights back, because as soon as a
16 defendant stops using drugs regularly, as soon as the
17 government couldn't prove that he was a regular user of drugs,
18 that that recency of drug use applied, he has his rights under
19 (g)(3) back. It's a temporary restriction for as long as the
20 defendant could be considered a chronic drug user.

21 Similarly, the prohibition on possession -- or
22 receipt, excuse me, of firearms by a person under indictment
23 is only temporary to the time that that indictment is
24 outstanding. Now, it may result in a longer-standing
25 prohibition of a felon in possession prohibition. But the

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1 922(n) prohibition is, by its very nature, temporary. That
2 indictment will be resolved in some way at some point.

3 THE COURT: I agree with you.

4 MS. NOKES: Okay. Your Honor, the other issue that
5 the Court addressed as a threshold question was whether
6 defendant's conduct in carrying the gun or using the gun for
7 whatever purpose the defendant used it for was covered by the
8 Second Amendment. And the government would argue the
9 defendant's purpose here carrying the gun while he's got a
10 bunch of drugs on him, pointing that gun at a police officer,
11 that's not conduct protected by the Second Amendment.

12 THE COURT: Oh, but -- so I guess the two statutes at
13 issue here deal with different types of conduct, right?

14 MS. NOKES: Um-hum.

15 THE COURT: Possession under the (g)(3). And
16 possession -- I mean, can you argue that under current
17 precedent that the possession of a firearm is not an activity
18 that falls within the Second Amendment?

19 MS. NOKES: Possession of firearm generally no, but
20 possession of a firearm by someone who's a chronic drug user,
21 who has drugs on them, who is then committing other crimes by
22 dint of the fact that he's a chronic drug user, yes.

23 THE COURT: But the crime he's charged with here --
24 and I mean, I don't countenance pointing firearms to anybody,
25 particularly a law enforcement officer, but what he's charged

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1 with here is being a chronic -- among other things, being a
2 chronic drug user or a drug user in possession of a firearm.
3 He's not charged with what we see on other cases brandishing
4 or use of a firearm in connection with a certain crime. So I
5 mean, isn't the activity we're looking at here just the simple
6 possession of the firearm?

7 MS. NOKES: I don't think we can divorce the
8 possession from the prohibition, from the fact of the chronic
9 drug use. So we're talking about conduct that is by statute
10 connected, that that person is a chronic drug user, that
11 person is possessing a firearm. So I agree with you to the
12 extent that the Second Amendment covers someone's ability to
13 possess a firearm. Obviously, Heller told us that the Second
14 Amendment gives an individual an individual right to possess a
15 firearm.

16 However, here we're discussing not just someone who
17 possessed a firearm, but a chronic drug user who possessed a
18 firearm, and that shouldn't be divorced in this context.

19 THE COURT: I mean, does the precedent bear out that
20 nuanced analysis? I mean, it certainly sounds like a very
21 helpful argument to the government. But I mean -- and again,
22 the defendants -- or I'm sorry, the plaintiffs in Heller and
23 McDonald and Bruen are not by accident they're there, right?
24 They're chosen in part because they're law-abiding nature and
25 all that. But is there anything in the cases that supports

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1 the idea that you're putting forward that we're supposed to
2 get that granular about the particular activity at play?

3 MS. NOKES: Your Honor, I think this is all part of
4 that threshold question analysis. So the questions about what
5 makes the person prohibited from possessing that firearm are
6 integral to the question of whether the Second Amendment's
7 going to apply to them. And I agree with the Court that the
8 Fourth Circuit has punted on that some, has given some
9 essentially dicta on issues related to whether a person or the
10 conduct is covered by the Second Amendment and then said,
11 yeah, okay, but we're going to apply the means on scrutiny and
12 find that this is okay anyway. But I can't point the Court to
13 a specific case that says the threshold question for a drug
14 user in possession, those two things cannot be divorced. And
15 so we ask not only is the person covered by the Second
16 Amendment, but is the conduct of possessing a firearm while
17 being a drug user covered under the Second Amendment.

18 THE COURT: I think the more puzzling question,
19 perhaps, is the question about 922(n), right? That doesn't
20 criminalize possession of a firearm by someone under
21 indictment. If Mr. Alston had a house full of firearms prior
22 to being indicted, he could possess them as much as he wanted.
23 It makes it illegal, among other things, to receive firearms,
24 what he's charged with here. And what's your argument as to
25 why receipt of a firearm under indictment is or is not Second

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1 Amendment-protected conduct?

2 MS. NOKES: Your Honor, at the point when someone is
3 under indictment, they know that they're under indictment, I
4 think that the statute reflects that they pose an extra danger
5 not just because of the fact that a grand jury has found
6 probable cause to believe that they've committed some serious
7 crime, but also because there may then be a motivation to go
8 after a witness, go after maybe a victim, or a prosecutor, a
9 judge, somebody like that.

10 THE COURT: Well, what I want to focus on Second
11 Amendment's protections. I mean, setting aside this law, the
12 Second Amendment protects that right to self-defense and, to
13 some extent, the militia aspects of it, too. And the Supreme
14 Court said possession is part of that right, the right to
15 possess those firearm, to keep and bear arms, right? That's
16 the text of the amendment. So is receipt part of that? Is
17 receipt of a firearm by anyone part of the Second Amendment's
18 protections?

19 MS. NOKES: Yes, Your Honor. I think that the Second
20 Amendment does cover receipt generally, yes.

21 THE COURT: Okay. And so would you say that in this
22 case the Second Amendment protects Mr. Alston's receipt of the
23 firearm or why not?

24 MS. NOKES: Your Honor, I don't think the Second
25 Amendment protects Mr. Alston's receipt of the firearm because

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1 he is a person who has been charged with a serious felony
2 crime and is under indictment. Because he has that indictment
3 pending, he doesn't have the protection of the Second
4 Amendment that law-abiding citizens would.

5 THE COURT: Right. Okay. So -- and again, hate to
6 belabor this, but I think it goes back to what I mentioned
7 earlier, "the people", right, "the people" as a whole have a
8 Second Amendment right to receive firearms; do you agree with
9 that?

10 MS. NOKES: Yes.

11 THE COURT: Okay. And there are some people, perhaps
12 Mr. Alston, perhaps not, Congress has said you, because of
13 your conduct or the fact you've been indicted, are excluded
14 from that portion of the right. And you're saying he falls
15 into that --

16 MS. NOKES: Yes.

17 THE COURT: -- that category?

18 MS. NOKES: Yes. Yes, sir.

19 THE COURT: Okay.

20 MS. NOKES: So in sum the government would say, at
21 least as to this threshold question, that defendant, not a
22 law-abiding citizen. As Helen said and Bruen reiterated, the
23 Second Amendment protects the right of law-abiding,
24 responsible citizens to use arms in defense. It doesn't
25 protect the nonlaw-abiding. And then I just cite that Heller

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1 and Broun both cite with approbation these prohibitions on
2 felons and the mentally ill.

3 THE COURT: When they say they're presumptively
4 lawful, but again, Mr. Altman isn't really charged with those
5 particular items, so I question how much that language is
6 worth here, given that he's not charged with those. And
7 they're saying that a challenge against those would have a
8 harder time, right, is what they're saying. So I don't know
9 what it has to say about the question we have here.

10 MS. NOKES: I think what they're saying is that a
11 challenge against, for example, the felon in possession
12 statute is dead in the water. And the government is aware of
13 no court that has found otherwise. And at this point, there
14 have been many challenges to 18 U.S.C. 922(g)(1). That the
15 Court is saying in both Bruen and Heller that this applies to
16 law-abiding citizen. And if you're -- citizens. And if
17 you're not a law-abiding citizen, like a felon, it doesn't
18 apply to you.

19 THE COURT: I mean, there's some academic debate
20 about this. But I mean, felons were typically or regularly
21 put to death, right? And after that, there was no need for a
22 firearm and no ability to get one. So again, I -- and I have
23 not seen in my research, nor has anyone cited anything to me,
24 showing that folks who use intoxicating substances back around
25 the founding era were subject to the same sort of harsh

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1 penalty for their use. So again, I don't know that it's an
2 exactly a one-for-one analogy there between the two types of
3 crimes.

4 MS. NOKES: And that's fair, Your Honor. I'm just
5 saying that the Court in making that distinction of law-
6 abiding citizens and saying that felons are not part of that
7 group and thus that there's no problem with dispossessing them
8 of firearms, the court is saying that the Second Amendment
9 applies only to those law-abiding citizens.

10 THE COURT: Okay.

11 MS. NOKES: Okay. May I turn to the historical
12 analysis?

13 THE COURT: Sure.

14 MS. NOKES: Okay. So the Bruen court recognized that
15 courts can't compare modern statutes to statutes from 100
16 years ago or 200 years ago or at the time of the founding
17 like, as they say, a red-line comparison in a word processing
18 application. The court's merely just asking us to analogize
19 our statutes -- our modern statutes against those statutes
20 from a couple hundred years ago. And I think the Bruen court
21 goes back even further than that.

22 So as this Court looks at analogous statutes, I think
23 the Court needs to keep in mind that even if the Court does
24 not find a one-to-one comparison between a founding era
25 statute and the modern statute, that does not mean that modern

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1 law is unconstitutional. It's only, as Bruen said, relevant
2 evidence. That is because, as other courts have recognized,
3 some restrictions that the founders would have believed to be
4 permissible would fail just because they happened not to exist
5 at the time of the founding era.

6 So the idea is that there -- you can think about it
7 as like a cloud of permissible laws that the founders
8 understood could be -- were constitutional, could be imposed
9 constitutionally. Just because that the entirety of
10 everything up in that cloud hadn't been written in the statute
11 book doesn't mean that the law itself or its descendant a
12 couple hundred years later is unconstitutional.

13 So if we look at 922(g)(3), first of all, the
14 government would note that drug use of the type that's seen in
15 modern life was not present or at least not prevalent at the
16 time of the founding. And so it's not a question that was
17 directly confronted by the founders. And there's no statute
18 in the founding era related to the type of controlled
19 substance use that we see today, the marijuana use, the
20 fentanyl use, things like that.

21 THE COURT: I guess this is a thread that runs
22 through a lot of this discussion, and that is at what level
23 generality do we approach this analogy? Because again, I
24 haven't -- nothing's been cited to me nor have I found a
25 statute like you're talking about, but perhaps that's too high

Colloquy

1 of a level of generality. But again, that's a difficult
2 question to answer.

3 MS. NOKES: You're right, Your Honor. And that's why
4 I cite to the fact that drug use has changed over the course
5 of the past 200-plus years. It doesn't look the same as it
6 did at the time of the writing of the Constitution. So we
7 have to look at statutes that are a little bit more general,
8 that look at things like dispossessing individuals because
9 they are drunkards or intoxicated by alcohol, and
10 dispossessing individuals who are mentally ill. I think those
11 are the two best historical analogues in this context. So --

12 THE COURT: Well, let's start with -- well, go ahead.
13 I have a question. But go ahead. I want to hear --

14 MS. NOKES: Sure. Okay. Turning first to statutes
15 that disarmed drunkards, founders were certainly familiar with
16 intoxicating drink. And it was, I think, as defendant pointed
17 out, important at the time of the founding, liquor in the
18 United States. But they also recognized that possession of
19 guns by drunkards posed a danger to the community. And they
20 understood that that danger could be mitigated by taking away
21 those guns.

22 THE COURT: Is that what they did, though? Didn't
23 they just prohibit folks from using fire, from shooting off
24 firearms, excepting weddings and funerals?

25 MS. NOKES: Your Honor, I don't think so. I think

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1 that some of the statutes, and they're cited in the
2 government's brief, talk about not just shooting off firearms
3 but actually taking guns away from intoxicated individuals or
4 drunkards, actually preventing individuals from having guns
5 for certain occasions where people were likely to be
6 intoxicated, because they recognized that danger and did not
7 see it as a problem under the Second Amendment to impose those
8 restrictions.

9 THE COURT: We're talking about the founding era
10 restrictions?

11 MS. NOKES: Yes, Your Honor, founding era and into
12 the Reconstruction era in the 1800s. And the government would
13 argue that drunkenness is analogous to drug addiction,
14 obviously not a one-to-one comparison, but analogous. Both
15 someone who's drunk or a drunkard and the drug user have
16 diminished capacity and are dangerous, especially around
17 firearms. Founders and Reconstruction-era legislators
18 understood that guns could be taken away from those folks in
19 order to protect the public safety, just as legislators in the
20 mid-20th century understood that guns can and should be taken
21 away from chronic drug users in order to protect the rest of
22 the public.

23 THE COURT: So I'm looking at page 13 of your
24 response brief, which I think is the relevant portion of this.
25 And if there's not, feel free to point me to the right

Colloquy

1 portion. You talk about the 1655 Virginia law that prohibited
2 shooting any guns at drinking, a 1771 New York law prohibiting
3 firing guns during the New Year's holiday, and then a 1746 New
4 Jersey statute that allowed military officers to disarm
5 soldiers who appeared drunk; is that correct?

6 MS. NOKES: Yes, sir, Your Honor, page 13.

7 THE COURT: So we've got three cases there. And
8 assuming I find those cases persuasive, I've still got to
9 confront the language in Bruen on page 2,142 of the Supreme
10 Court Recorder. It says, "In the colonial era, respondents
11 point to only three restrictions on public carrying. For
12 starters, we doubt that three colonial regulations could
13 suffice to show a tradition of public carrier regulation".
14 And so even if I find those three cases to be one hundred
15 percent on point, is that enough under Bruen?

16 MS. NOKES: Your Honor, the government would argue
17 that it is because what it shows is that at the time of the
18 founding -- prior to the founding, then at the time of the
19 founding and then into the 1800s, there was this evolution of
20 disarming individuals who were intoxicated, who were drunkards
21 from having firearms because they were considered to be
22 dangerous. And that evolution just continued. As
23 intoxicating substances became more potent, became something
24 other than just alcohol, became the marijuana and the cocaine
25 and the fentanyl and the meth that we see today, those

Colloquy

1 statutes had evolved along with them. And because the Court
2 can look at this entire timeline and see statutes from prior
3 to the founding all the way up until today, following this
4 evolutionary timeline and following along with the evolution
5 of use of substances in this country, the government would
6 argue that that that is absolutely consistent with the
7 historical tradition of firearm regulation in this country.

8 THE COURT: So two of those three colonial era cases
9 that you cited talked about firing firearms. And the one
10 about the military officers seemed to involve disarming
11 someone. But it seemed like the historical tradition outside
12 of the military was more to prohibit use as opposed to
13 possession of the firearms. So why should -- I mean, and
14 that is a distinction that the law recognizes in a bunch of
15 different contexts. So why should I not find that, again, if
16 I accept those cases as sufficient that the historical
17 tradition was actually one of possessing -- of prohibiting
18 using a firearm as opposed to merely possessing one?

19 MS. NOKES: Your Honor, I think that the Second
20 Amendment covers both firing firearms, certainly in a
21 noncriminal context, not firing at somebody, not firing in a
22 sensitive place, those sorts of things. Second Amendment
23 covers firing firearms just as much as it does cover
24 possession of firearms. So the fact that those are two
25 different activities shouldn't matter in the Court's analysis

Colloquy

1 because we can show this historical tradition.

2 THE COURT: The core of the Second Amendment is self-
3 defense, and we're looking at how that's impacted here. There
4 is self-defense value in an open carrying a firearm and I
5 guess to the carrier's concealed carrying a firearm. And
6 there's certainly some deterrent value in brandishing a
7 firearm, which are not restricted by two of the three cases
8 that you've cited. So why is historical tradition one of
9 disarmament as opposed to disallowing use?

10 MS. NOKES: Your Honor, I would argue that the
11 historical tradition shows that the Second Amendment right,
12 whether that's firing or possessing the firearm, can be
13 burdened because the person poses a danger, because of the use
14 of substances, and not that it matters necessarily exactly
15 which piece of conduct that is covered by the Second Amendment
16 that person was actually engaged in.

17 THE COURT: So Judge Wyrick in Oklahoma wrote a
18 lengthy opinion kind of really diving into these various
19 statutes and found to his satisfaction that they did not --
20 that the reason, the why, right -- Bruen talks about the how
21 and the why -- the why did not match up with our current-day
22 whys. One of the no firing firearms drunkenly is because we
23 need to use firearms to alert us when there's -- our enemies
24 are approaching. And if you're always firing off firearms, we
25 won't be able to distinguish between real threats and drunken

Colloquy

1 discharges of firearms. So do I -- do these -- does the why
2 of these various statutes comport with the why of the ban on
3 Mr. Alston's possession?

4 MS. NOKES: Your Honor, I believe that it does. In
5 the government's brief page 12, we cite to a -- and I guess an
6 article by Benjamin Rush, a signer of the Declaration of
7 Independence, who talked about habitual drinking being a form
8 of insanity. In the Yancey decision from the Seventh Circuit,
9 Seventh Circuit talks about the danger that persons under
10 substances pose to the rest of society. And I think that
11 thread is present throughout these statutes, not just showing
12 that they needed to have a Paul Revere moment and alert other
13 folks when there was some sort of issue, but also that these
14 statutes were important to protect the public.

15 THE COURT: I think Mr. Rush's statements are what
16 they are. But I mean, are you -- I'm looking -- you cited
17 these three colonial-era laws -- I mean, does the why of those
18 particular laws provide support for your argument here?

19 MS. NOKES: Your Honor, I don't have any statements
20 upon the promulgation of any of those laws that show that in
21 1655 the legislature of the Colony of Virginia was primarily
22 or solely concerned with the public safety in passing a law
23 preventing someone from possessing a firearm while drinking.
24 But I think the evolution of these statutes, dispossessing
25 folks who are under the influence of substances, shows that it

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1 is about danger to the community.

2 Your Honor, we also argue that 922(g)(3) is analogous
3 to disarmament of the mentally ill. Of course, the Bruen and
4 the Heller courts say that their decisions don't cast any
5 doubt on regulations that prohibit firearm possession by
6 felons or persons who are mentally ill. As we know today,
7 drug addiction is actually a mental illness. Substance use
8 disorder is recognized in the DSM-5. And interestingly, in
9 the DSM-5, there are several different categories for
10 substance use disorder. One of them is cannabis use,
11 marijuana use, and another is alcohol use, and then there are
12 several others opioids and things like that.

13 But habitual drug users, like others with mental
14 illness, are more likely to have difficulty exercising self-
15 control and making it so that it's a dangerous proposition for
16 someone like that to have a weapon. So given that drug
17 addiction is, in fact, a mental illness and that chronic drug
18 use has at least some of the same effects of mental illness,
19 reducing inhibitions, preventing that person from being able
20 to exercise an ordinary level of self-control, making them
21 dangerous to society, the government would argue, as it has in
22 its brief, that drug users are at least analogous to the
23 mentally ill for purposes of restrictions on possession of
24 firearms, which again, the Bruen and Heller courts say are
25 just fine.

Colloquy

1 THE COURT: Sorry, point me to the laws about -- that
2 you've cited in here about disarming the mentally ill.

3 MS. NOKES: I'm sorry?

4 THE COURT: You're talking about that there were laws
5 about disarming the mentally ill and all that. Where in your
6 brief are those laws? Just like what -- the -- as we sit
7 here?

8 MS. NOKES: Your Honor, the government cited opinions
9 discussing longstanding prohibitions on possession of firearms
10 by the mentally ill; that's from Heller. We cited Yancy for
11 the proposition that in 18th century America justices of the
12 peace were authorized to lock up lunatics who were
13 dangerous -- too dangerous to be permitted to go abroad. We
14 didn't, as in the situation with disarming drunk individuals,
15 cite specific statutes from 1600 or 1700s so.

16 THE COURT: Well, I mean, the justice of the peace
17 manuals are an interesting thing, right? They go through -- I
18 was looking at this yesterday -- I mean, they go through and
19 they define mental illness in different ways. Kind of a
20 short-term episode would not necessarily be considered mental
21 illness, but a longer term one might be. So again, that sort
22 of nuance may be relevant here. I mean, if it's -- in
23 determining whether it's -- chronic use of a drug qualifies
24 closely enough as a mental illness so --

25 MS. NOKES: Your Honor, I agree, actually, that that

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1 nuance is relevant and that that is why it's important that
2 for 18 U.S.C. (g) (3) the government has to be able to prove
3 that that use this chronic, that it is regular, that it is
4 recent. It is not someone who smokes a blunt, gets high, and
5 is off their gourd for a day. It's not that. We're talking
6 about someone who is a chronic user of controlled substances
7 in the way that someone who has a mental illness has a long-
8 term issue, which the founders and statutes, legislators
9 throughout the 1800s did not have a problem dispossessing from
10 possession of firearms.

11 THE COURT: All right.

12 MS. NOKES: Okay. So turning, then, to 18 U.S.C.
13 922(n), the prohibition against receipt of a firearm while a
14 person is under indictment, the government argues that that
15 statute is consistent with the nation's history and tradition
16 of firearms regulation in three ways; two of them are fully
17 expanded in our brief -- I'll go over them briefly -- but then
18 also surety statutes. So we talk about the fact that this
19 burden on Second Amendment rights, when someone is facing a
20 felony indictment, is similar to other pre-trial burdens on
21 rights. We talk about the fact that 922(n) is analogous to
22 prohibitions against dangerous individuals possessing
23 firearms, and then the fact that this is analogous to some of
24 the surety laws that the Court actually took a look at in
25 Bruen.

Colloquy

1 So speaking first about the Second Amendment's burden
2 on -- or excuse me, the 922(n)'s burden on Second Amendment
3 rights being similar to burdens on other pre-trial rights, the
4 Court is, of course, aware that a person can be completely
5 locked up prior to trial. They can have a burden on their
6 liberty that's so extreme that they're sitting in a jail cell.
7 Obviously, they don't have access to guns while sitting in a
8 jail cell. And from the time of the founding, that has been
9 completely constitutionally appropriate. At the time of the
10 founding the founders were familiar with the English Bill of
11 Rights Act, which was not understood to afford bail in all
12 cases. Some people who have been arrested are subject to a
13 search of their person, incidental arrests burdening a Fourth
14 Amendment right. They can even be strip searched, again,
15 burdening a Fourth Amendment right. Someone who's got pending
16 felony indictment, like I said, could be locked up and in
17 being locked up could have restrictions on their First
18 Amendment right, could have restrictions on the kind of
19 materials that they're able to get while in custody. And they
20 can also have restrictions on their Sixth Amendment right as
21 the government can seize potentially for finable assets and
22 prevent that person from hiring counsel of their choosing. So
23 there are there are a slew of rights that are in the Bill of
24 Rights that the government can accurately, adequately,
25 constitutionally burden when someone is facing a felony

Colloquy

1 indictment.

2 And in the Bruen opinion, Justice Thomas talks about
3 the fact that the Second Amendment is not a second class
4 right. But he does not say that the Second Amendment is more
5 important than every other right in the Bill of Rights. So if
6 it is constitutional to burden the Fourth Amendment, the First
7 Amendment, the Sixth Amendment, it is logical to understand
8 that it is also constitutional to burden that Second Amendment
9 right.

10 THE COURT: So a lot of what you say makes sense.
11 The one kind of question that I have in my mind about -- or
12 one of them, about this issue is obviously every day here we
13 go through the exercise of determining whether someone's let
14 in or out of custody. And if they're let out, almost always,
15 we say they can't have a firearm, right? And that seems to
16 have been upheld by the courts. And it makes sense because
17 the alternative was -- is that you go to prison and are
18 deprived of all of your liberty pending your trial. That all
19 makes sense to me.

20 But not every defendant is -- some defendants are
21 aware they're under indictment before they're arrested, before
22 they show up in a court. So does the same argument apply if
23 they're not facing that burden of I need -- I could be in jail
24 or -- but I'm not, so I have slightly fewer rights, but at
25 least I'm not in jail, does that still apply to someone who

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1 hasn't gone through that formal process, hasn't being arrested
2 and gone through all that?

3 MS. NOKES: Your Honor, I'm not familiar with
4 circumstances in which individuals have been charged with
5 possessing firearms while under indictment when they haven't
6 actually been served with their indictment and appeared before
7 a court.

8 THE COURT: We hear -- at least we hear all the time
9 of defendants or groups who monitor the docket to see if
10 people have been indicted for either their own knowledge or
11 for the knowledge of others and -- or maybe someone's aware
12 that your office calls them and says, we've got you under
13 indictment, you should turn yourself in or come talk with us
14 otherwise. So there are circumstances people can be aware
15 they're under indictment and thus 922(n) would come into play,
16 but they're not going through -- they're not yet going through
17 all the formal steps that occur here in the courthouse. So is
18 the same argument apply with the same strength?

19 MS. NOKES: So there's two things there. I guess
20 what I'm saying is I'm not aware of anyone having been charged
21 with 922(n) without having first at least been served with the
22 indictment. But what I would say there is that, yes, once
23 that person is under indictment, they are subject to being
24 arrested. Once they're arrested, they're subject to a search
25 and to arrest. So they don't have the same Fourth Amendment

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1 search protections of their person that you and I have because
2 we're not subject to an indictment. They could be strip
3 searched upon their arrest. All those other prohibitions or
4 burdens, I should say, on Bill of Rights rights could apply
5 even if that person has not yet been served with their
6 indictment. So I don't think it's a problem that that burden
7 could also apply to the Second Amendment.

8 THE COURT: Okay.

9 MS. NOKES: And Your Honor, I just note that the
10 Ninth Circuit has looked at this issue not as it relates to
11 922(n), but as it relates to 18 United States Code Section
12 3142(c)(1)(B)(VIII), the provision that allows for courts to
13 impose a restriction on a defendant's ability to have a
14 firearm while they're on pre-trial release. And the Ninth
15 Circuit said, yeah, that's not a problem because these other
16 burdens on Bill of Rights rights could apply, that we could
17 absolutely lock that person up. Obviously, they wouldn't have
18 access to a firearm. We can also say you can't have a firearm
19 while you're pending indictment. So similar code section and
20 similar analysis, the government believes, to a 922(n)
21 scenario.

22 The government also believes that 922(n) is analogous
23 to prohibitions that existed at the time of the founding
24 against dangerous individuals possessing firearms. The
25 court -- the Fifth Circuit in the National Rifle Association

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1 v. the Bureau of Alcohol, Tobacco, and Firearms said that
2 there are historical records of the ratification debates that
3 confirm the founders' belief that disarming select groups for
4 the sake of the public safety was compatible with the right to
5 arms in the Second Amendment. And as we have briefly
6 discussed, there were founding era statutes that disarmed
7 dangerous individuals. Dangerous here at least sometimes
8 equated to disloyalty. And that may seem odd in our today
9 understanding of disloyalty, but at the time, the country had
10 just gone through this Revolutionary War where you had
11 colonists who were loyal to the states and colonists who were
12 loyalists to the crown. And once that war is over, they've
13 got to live next to each other. And the fact that you have
14 someone who's still loyal to the crown or may foment a
15 rebellion would have been seen as a significantly dangerous
16 person. It makes sense that that person posed danger in the
17 context of the time. So we're talking about the founders'
18 understanding that those persons could be dispossessed of
19 their firearms for the sake of the public safety of other
20 loyal colonists.

21 THE COURT: Well, is it really a question of the
22 public safety in that context? I mean, I don't disagree with
23 what you've laid out about why those laws are there, but it
24 seems to be more of a national security issue, really. And
25 that's what we'd call today, right? We have people who may

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1 invade us and we don't want them having guns, so we're going
2 to take those away from those people. We have the Catholics
3 they thought would be loyal to the pope as opposed to the
4 government, and we don't want that because they might try to
5 overthrow our country. And enslaved people, they thought, had
6 reason, rightfully so, to be upset at the current state of
7 affairs and might try to overthrow things, too. And so it
8 seems to be more national security than these people are going
9 to go out and commit crimes.

10 MS. NOKES: At a more granular level, though, they
11 pose a risk to people who are loyal to the new government,
12 their neighbors who are loyal to their new government, the
13 kinds of people that they can affect in their daily lives
14 rather than the entire national security. We're not talking
15 about today's world where it's easy to hop a flight or get in
16 a car, drive three hours, find like-minded individuals,
17 organize on social media, figure out your cause, do all that
18 kind of thing. We're talking about people who were mostly
19 confined just by circumstances of transportation and
20 technology to their, like, little spheres of influence. And
21 those people posed a danger -- an immediate danger to their
22 neighbors who were loyal to the new country. I would say more
23 than they posed a danger, any one individual posed a danger to
24 the entire national security.

25 In 922(n), we have a group of dangerous individuals

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1 whom a grand jury has found probable cause to believe have
2 committed some serious crime, some crime for which legislators
3 have determined that the appropriate punishment is prison --
4 or the maximum punishment is prison, some term of imprisonment
5 exceeding one year. That's a serious crime. And so the
6 legislature -- so the statute allows the burden on their
7 Second Amendment right to the extent that they cannot receive
8 new firearms. It doesn't even say that they can't possess
9 firearms because if they had a shotgun in the closet when they
10 got indicted, they could still have that shotgun in the closet
11 once they get home from court. But they can't go out and get
12 another gun once they've been indicted.

13 And it seems to the government that that is a pretty
14 clever way of threading the needle of making of a burden on
15 the Second Amendment right that is not a full taking away of
16 that right, just burdening the potentially dangerousness of
17 someone arming themselves with a fresh arsenal once they've
18 been indicted for a crime. So it's an --

19 THE COURT: Isn't that kind of the means to an end
20 argument, though, Bruen told me I can't consider?

21 MS. NOKES: Well, you know, it's interesting because
22 you're right, we can't consider means ends. But in
23 analogizing, we have to consider that as Bruen talks about the
24 how and the why of why these statutes were promulgated and how
25 modern day statutes are similar to olden days statutes, right?

Colloquy

1 So some of that analysis is going to look similar, but the
2 Court tells us we have to do that in the historical context.

3 So the government would submit that this burden on
4 Second Amendment rights for folks who have been found to be
5 nonlaw-abiding, have been found to be dangerous, at least to a
6 probable cause level by a grand jury, is similar to the
7 dispossession of firearms by folks considered to be dangerous
8 at the time of the founding.

9 We'd also analogize 922(n) to surety laws. As
10 discussed in Bruen, starting in the mid-1800s there were
11 security laws that began to proliferate, which generally
12 provided that an individual's Second Amendment right could be
13 burdened if another person could make out a specific showing
14 of reasonable cause to fear an injury or a breach of peace.
15 They would have to provide some sort of -- essentially like
16 bail money in order to get their right to possess a firearm
17 back because someone else had accused them of being a
18 potential danger, being a potential breacher of the peace.

19 So 922(n) is somewhat similar there in that it
20 obviously imposed a burden on people considered to be
21 dangerous because they're facing a serious crime. But it's
22 less restrictive than these surety laws. It requires, first
23 of all, legitimate criminal justice process in order to take
24 effect. A prosecutor has had to go to a grand jury, has had
25 to present probable cause, has had to get the issuance of an

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1 indictment, and then only restricts the receipt of the firearm
2 and is only a temporary restriction, right? It only lasts so
3 long as that indictment lasts.

4 THE COURT: So I mean, you say it's less onerous, but
5 from where I sit it seems much harder to make an indictment go
6 away than to pay a bond to go to prison or satisfy a surety
7 requirement. I mean, the fact that it can do that itself,
8 right? Let's say we had a surety bond process here, right?
9 Mr. Alston could have paid that money, found a bondsman, found
10 some family and paid that. There's no equivalent process to
11 make you all dismiss the indictment, right? It's going to be
12 there until process completes itself. So it seems much more
13 onerous, actually.

14 MS. NOKES: Your Honor, I would argue that it's --
15 the person can pay that surety bond if it is possible for them
16 to pay. So first of all, not everyone had means, I assume, to
17 pay a surety bond once that was required of them. But second
18 of all, this is a process that is backed up by the criminal
19 justice system, that is backed up by the prosecutor presenting
20 that case to a grand jury, that is backed up by the finding of
21 probable cause, that is backed up by the issuance of an actual
22 indictment, not just some random person saying, I think Joe
23 Schmo is a breacher of the peace and should be required to pay
24 some surety in order to carry a firearm. So it is more
25 onerous in the fact that the defendant does not have complete

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1 control over whether that indictment is dismissed or when that
2 indictment is dismissed. But it is -- requires a lot more
3 from the government than would have been required just by
4 someone saying, I think he's a danger to us, so we got to make
5 him pay.

6 THE COURT: But the majority of thing in Bruen seems
7 to not find the surety lost to be all that compelling. I
8 mean, I understand they're on the books and they existed, but
9 they didn't seem to feel like the existence of surety laws
10 really provided a meaningful remedy -- whatever the innovation
11 of the Second Amendment rights. So should I afford any weight
12 to this particular argument in light of the Supreme Court's
13 attitude toward them?

14 MS. NOKES: Your Honor, I absolutely agree with you
15 that the Bruen court seems skeptical of the surety laws being
16 analogous to New York's requirement that folks actually
17 provide some reason why they had to have a gun. But I don't
18 think that the Supreme Court in saying, look, the analogy
19 isn't strong enough here, we're not going to give this a whole
20 lot of weight, it is quite as strong when you look at the fact
21 that it is more factually similar to the circumstance we have
22 before us in 922(n) than New York's scheme for forcing people
23 to provide reasons for why they needed a gun before they could
24 actually go get a gun. So I think that it is more meaningful
25 here than it was in Bruen, though I understand that the Bruen

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1 court kind of looked askance at those surety laws, did not
2 find them to be particularly compelling.

3 But I will tell the Court that other courts who have
4 looked at 922(n) in the wake of Bruen have found the surety
5 laws to be compelling. To cite just one, United States v.
6 Jackson. This is 2023 Westlaw 2242873. In that the court
7 talks about many of the things that we've already discussed,
8 but does find that in amongst those things that the surety
9 laws are more analogous or that are analogous to 922(n)
10 perhaps in a way that the Supreme Court did not feel the New
11 York statute was in Bruen.

12 So Your Honor, I'll just say to sum up, defendant as
13 a nonlaw-abiding citizen is not covered by the Second
14 Amendment, which applies to law-abiding citizens. And even if
15 his conduct did fall within the scope of the Second Amendment,
16 the restrictions at issue here, 922(g)(3) and 922(n), are
17 analogous to a historical disarmament of dangerous individuals
18 and the other statutes that we've cited, which makes them
19 consistent with this nation's history and tradition of
20 firearms regulation. We feel that these statutes are thus
21 constitutional.

22 THE COURT: Thank you. One final question. You've
23 described this in your briefs as a facial challenge, and that
24 seems to be a fair characterization of what's going on here.
25 And I'll hear from Mr. Gray in a moment about that issue. But

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1 Bruen seemed to change the mode of analysis here. I mean,
2 it's not the standard facial challenge. It's the government
3 must affirmatively prove that this is constitutional, which
4 seems to be a change. And so does that matter here?

5 MS. NOKES: Your Honor, I don't think we have any law
6 to say that the standard way of looking at a facial challenge,
7 which is that no facial challenge can survive if there is any
8 circumstance which it could be constitutional under the
9 statute -- we don't have any law to say that that's not how
10 we're to look at these facial challenges post-Bruen. I mean,
11 that would be a huge sea change, I think, that I haven't seen
12 addressed in by any other court. And the fact that once the
13 threshold question is answered about whether the defendant and
14 his conduct are covered by the Second Amendment, the
15 government has to come up with some historical analogies, I
16 don't think changes the entire analysis of how we look at a
17 facial challenge and says that we basically treat them as
18 applied challenges now. I don't think that mixing has
19 happened.

20 THE COURT: Thank you.

21 MS. NOKES: Thanks.

22 THE COURT: Mr. Gray.

23 MR. GRAY: Thank you, Your Honor. And Your Honor, I
24 want to say thank you for giving us the opportunity to talk
25 about this case because when all of us went through law

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1 school, we all had a chance to see a bunch of cases that came
2 out where we had to sit there and wonder, what in the world
3 was the Supreme Court thinking? How did they get to this
4 reasoning? How did they get this ending? What was the
5 analysis? And I can say very comfortably that in this case
6 with Bruen, this is one of the most clear-cut cases that we've
7 seen the Supreme Court put out because it said very simply
8 this, who does this apply to? At page 2,156, all Americans.
9 All Americans. When is a statute going to be constitutional
10 with regard to regulating the Second Amendment? If it existed
11 prior to that.

12 We're talking about -- and I know the government said
13 it was a sea change, but it really is. We saw a court that
14 ultimately took a line of analysis that was at Heller where we
15 saw the means ends analysis really permeate through how courts
16 were looking at these sort of statutes. Bruen was the big
17 change where the Court ultimately said, listen, this isn't
18 that complicated. The right to bear arms for self-defense or
19 other lawful purposes is absolute, period, dot. We wrote it
20 in the second -- it's written in the Second Amendment. The
21 next part is pretty simple, who does this apply to? All
22 Americans. There is no restriction as to law-abiding, and we
23 discussed in our brief how the government was going to latch
24 on to that idea of law-abiding. But if you start to go down
25 that rabbit hole of what is law-abiding and what do they mean

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1 by that parsing through all of the various layers of that
2 onion, not only are we dismantling what the Court was trying
3 to put across in Bruen, but we ultimately start walking down
4 this area where we are eventually right back at the means ends
5 analysis, which was destroyed by Bruen. And I don't mean just
6 overlooked, it was destroyed.

7 If we use the government's line of analysis, that
8 circular reasoning, which is that Mr. Alston can't own a
9 firearm because there's a statute that says that he can't own
10 a firearm, we really start to walk down a pathway of whether
11 or not we're interpreting this amendment in the appropriate
12 way. As we take a look at what was said in the Bruen court,
13 let's take a look at Heller, and let's take a look and see
14 whether or not that analysis was clear enough. They said no,
15 the clarity is here. Did this statute exist before the
16 founding of the passage of the Second Amendment? Government
17 will concede yeah.

18 The next question is, using a historical analysis, is
19 this going to be the same type or similar statute? And the
20 government can't say that it is. When we start looking at
21 things that are covering "law-abiding persons", we've really
22 got to ask ourselves two real questions: What do we mean by
23 law-abiding in that context? Well, it seems pretty clear that
24 the Court said law-abiding means those who have committed and
25 been convicted of an offense.

Colloquy

1 In this case but for the fact that he's charged under
2 these two statutes, Mr. Alston wouldn't be here. There is no
3 challenge as to whether or not he could have possessed the
4 firearm, because he's not a felon. He could possess firearms.
5 The only thing that restricts him from possessing a firearm is
6 the statute that says that you can't possess it while under
7 indictment. And when we take a look at that analysis, that
8 portion of the analysis clearly wasn't there and we don't see
9 any citations asked of that existing in our pre-Second
10 Amendment era.

11 THE COURT: On the law-abiding point, right? The --
12 and if you -- what's been submitted to me is that the
13 defendant has admitted that he's a regular marijuana user,
14 which under federal law, whatever states it's done, under
15 federal law, that's illegal. So that makes them a nonlaw-
16 abiding person under federal law. And he's been indicted,
17 which doesn't necessarily make him -- I mean, he's got a
18 presumption of innocence, but it's certainly not exactly as --
19 if law-abiding's on scale, perhaps, it's not -- we're not
20 quite at one hundred percent, but at least the drugs indicates
21 not necessarily law-abiding as far as the federal government
22 is concerned. So isn't there some -- and there is some
23 restriction, and we talked about Heller, talking about these
24 presumptively lawful areas. I mean, there are some people who
25 don't get to enjoy these rights as fully as others. So why is

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1 it not -- and there was lots of emphasis on law-abiding both
2 in the majority and in the concurrences, and so why is it
3 not -- why don't I take into account the fact that there is
4 evidence of nonlaw-abiding conduct here?

5 MR. GRAY: And Your Honor, you are walking exactly
6 down the line of analysis that got us to Bruen in the first
7 place, because there's clearly an idea that there are certain
8 types of persons that we feel should not be able to own
9 firearms. And if we look back historically, you know who
10 those persons were? If you look at what we've cited in pages
11 15 and 16 in our brief or in pages 11 and 12 of their brief,
12 you're going to see kind of two types of statutes that govern
13 drug users or people who are intoxicated. People who are
14 about to go off and shoot that firearm while intoxicated -- we
15 don't have that in this case. But that's a pro act of saying,
16 you know what, using the mends (sic) -- the ends-means
17 analysis, yeah, we can all think that a person with a gun
18 who's drunk probably shouldn't be around firing. However,
19 unless it's a wedding or a funeral, somewhere where we need
20 fireworks, it's all good. But when we take a look at that
21 line of analysis, once again, we've walked ourselves right
22 back into the means-ends analysis.

23 THE COURT: Well --

24 MR. GRAY: And --

25 THE COURT: -- aren't you somewhat running into the

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1 language in Bruen about Second Amendment not being a
2 regulatory straitjacket, and it doesn't need to be an exact
3 match? I mean, it seems like, obviously, as I mentioned,
4 there are benefits to having a firearm if you're confronted,
5 even if you can't shoot it for one reason or another. But the
6 ultimate power of the firearm is being able to use it. And if
7 that's restricted, why is it not analogous, although not a
8 one-for-one match, with some of the things we're talking about
9 here?

10 MR. GRAY: No, I completely understand where you're
11 going at with that, Your Honor. But once again, that's the
12 ends-means analysis. That's where we're -- where it's
13 sitting. And the court in Bruen said, all right, we're not
14 going to do that. Clearly, the court in Bruen was like, okay,
15 listen, those who have been felons, that's something that
16 we're comfortable with saying that may be an area for
17 regulation. But then when we look at where the court
18 ultimately landed, it was take a look and see whether or not
19 this was a pre-Second Amendment issue.

20 THE COURT: Well, I mean, but Heller -- or Bruen asks
21 me and all judges to look at the how and why of the
22 restriction on Second Amendment rights.

23 MR. GRAY: Um-hum.

24 THE COURT: And that's distinct from means end.
25 Means ends is it's a bad idea for drug users to have guns

Colloquy

1 because they're going to go -- they're more likely to lose
2 control and commit crime, right? That means end, right? This
3 is how and why is we take the gun away from someone perhaps
4 because of the threat they pose to the public.

5 MR. GRAY: Well, Your Honor, I'm going to argue that
6 how and why is actually embodied in Justice Thomas' statement
7 that you look and see whether or not this existed before the
8 enactment of the Second Amendment, because that's your how and
9 why. To use as an example, the government's arguing that Mr.
10 Alston is an addict. Okay? But if we use their how and why
11 analysis, it fails. What do we know about addiction to
12 marijuana? Absolutely nothing. The reason why we know
13 nothing about addiction to marijuana is because the federal
14 government for years didn't allow anybody to go into the study
15 of this. The DSM-5 identifies substance abuse disorders. And
16 within its commentary, it talks about addictions to various
17 drugs. But I think it's also important to note that in 2012
18 when the American Psychological Association was asked the
19 question about, hey, how do we feel about the enactment -- and
20 at this point, we're at thirty-six, and currently in North
21 Carolina we're arguing whether or not medicinal marijuana use
22 is appropriate -- where on that scale do we try to figure out
23 what's the addictive problems of marijuana, what's the
24 problems of marijuana that make it different than alcohol.
25 And in that case, the American Psychological Association said,

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1 we'd love to be able to answer that, but there just hasn't
2 been enough study.

3 So if we want to look at this in an analogous sort of
4 way, which the government wants you to do, it's looking at it
5 from the standpoint of alcohol. And here's the real question.
6 Under the statute, if you had a beer, does that mean that you
7 can't have a firearm ever again? I would say that's
8 ridiculous. You had ten beers; would that mean that you're no
9 longer eligible to fall under the Second Amendment
10 protections? Once again, everybody else would say that's
11 ridiculous.

12 THE COURT: Well, I mean, I guess there's ambiguity,
13 right? Like, the law prohibits firing guns while drunk. And
14 that's going to depend on -- your tolerance might be different
15 from mine one way or the other, so there is ambiguity and
16 vagueness there. But I want to go back. I'm sorry. I want
17 to go back and I want to cover here -- we covered in somewhat
18 of an ordered way with me take taking a field every once in a
19 while, but I want to try to do the same thing here.

20 As we talk about whether the defendant's entitled to
21 Second Amendment protections, we've talked a bit about the
22 law-abiding question, the actions he was taking. What I hear
23 from the government is the defendant's actions are not
24 protected by the Second Amendment because he was pointing the
25 gun at a law enforcement officer and doing other things we

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1 generally frown on. Is that the level of analysis I should
2 take or is it the more generalized he was possessing a firearm
3 here?

4 MR. GRAY: Your Honor, in this case, the conduct is
5 possession of a firearm; that's all. If he had been charged
6 with assault on a federal law enforcement officer, different
7 analysis. If he had been charged with firing on a law
8 enforcement officer, completely different analysis. If we had
9 been charged with any of those sort of similar offenses, the
10 analysis is different. But in this case, when we look at the
11 conduct, the conduct is simple: Did he possess it and did he
12 receive it? Possession while under indictment, receipt while
13 an addict. And --

14 THE COURT: The other way.

15 MR. GRAY: -- both of those --

16 THE COURT: The other way.

17 MR. GRAY: Oh, I'm sorry. Yeah. Thank you, Your
18 Honor. But when we look at that issue, when we look at that
19 issue, the real question still stops us right back to the
20 analysis of Bruen, which is, was that a prohibition that
21 existed prior to the enactment of the Second Amendment?

22 THE COURT: Well, so I mean that is a question. I
23 mean, the question is, is the possession and receipt of a
24 firearm for anyone, are those things the Second Amendment
25 protects? Is that part of the keeping and bearing of arms?

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1 And that's I think that's one of those threshold questions.

2 And I think obviously the possession of a firearm is,

3 undoubtedly. Is the statute dealing with receipt of a

4 firearm, is that implicating the keeping and bearing arms?

5 MR. GRAY: I think that is directly bearing on the

6 bearing of arms. So when we're talking about both of these

7 aspects, the Second Amendment is being directly implicated.

8 THE COURT: It seems to implicate it --

9 MR. GRAY: I think --

10 THE COURT: -- less --

11 MR. GRAY: -- it's clear --

12 THE COURT: -- less in the context of receiving

13 because, again, if Mr. Alston had all the firearms he ever

14 wanted, there was no -- I mean, unless he came in here and

15 there were conditions put on him, there was no prohibition on

16 him possessing those. I mean, it's receipt, right, under

17 922(n). So does that -- that seems like a lesser limitation,

18 although still a limitation. And if -- and you can push back

19 on that if you want. And does that fact impact anything I do

20 down the line with the analysis, meaning is there somewhat of

21 a different standard when the restriction on the Second

22 Amendment right is a lesser one?

23 MR. GRAY: I think that argument and that line of

24 analysis would have held prior to Bruen. That is a classic

25 Heller analysis right there. That is exactly the sort of

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1 means-ends analysis that was rejected by the court. And
2 that's why the arguments get very circular when we start to
3 listen to the government's argument with regard to why we're
4 prohibiting this. Well, is he a law-abiding person? Well,
5 the -- the court was pretty clear, the Second Amendment
6 guaranteed to "all Americans the right to bear commonly used
7 arms in public, subject to reasonable, well-defined
8 restrictions".

9 THE COURT: Then why all the ink spilled on law-
10 abiding citizens? They say that tons of times in all these
11 opinions, so why are we spilling all the ink on that if it
12 doesn't matter?

13 MR. GRAY: You want the real answer, Your Honor?

14 THE COURT: I want your answer.

15 MR. GRAY: Because my answer is going to be the real
16 answer. There are certain people that we don't want to have
17 firearms, and we need to come up with a way to keep them from
18 having firearms. So we're going to come up with that
19 analysis. However, I do think that's really, really important
20 to understand when we look at the thread that is consistent
21 from Heller to Bruen and other similar cases. It's really
22 kind of up front when we look at what Justice Thomas was
23 asking us to do, which is it is not up to the courts to
24 legislate this issue. If you want to keep people from having
25 those firearms, there's a legislative process. And when we

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1 look at why we get rid of ends -- the means-ends, that really
2 takes the courts and puts them back into a position where
3 they're able to make the analysis in a clean way. Because
4 it's a simple proposition at that point in time. Did that law
5 previously? If it did, then it holds up. The Second
6 Amendment is essentially a filter that filters through
7 legislation that says, hey, we have the ability to still have
8 well-reasoned and well-defined restrictions but to determine
9 the how and the why of what a well-defined and reasonable
10 restriction is, that's where you look back to the founding
11 eras.

12 THE COURT: So you've mentioned a couple of times we
13 need to look at -- we look whether it existed prior to the
14 Second Amendment. And obviously it'd be very helpful to the
15 government if they could point to exact duplicates of the
16 current laws. But the Supreme Court didn't freeze us in 1791.
17 They did say we can look at things going forward. And the
18 further you get from the ratification of the Second Amendment,
19 the less weight to be accorded to those laws. So what do I
20 make of the fact that as our -- in the late 18th century,
21 we're looking at a country that's a nascent country, brand
22 new, just fought a war, has no money, no form of government,
23 threats from all around. They're trying to do certain things.
24 And perhaps gun regulation wasn't at the top of the list,
25 right? As things get more stable and move forward in the

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1 1800s, pre-Civil War, you see more and more regulation. So I
2 don't think Bruen requires me to throw all that in the dust
3 bin, but why should I not consider that in determining what
4 the scope of the Second Amendment is?

5 MR. GRAY: Well, I think that it should be
6 considered. I mean, when we take a look at the statute under
7 which Mr. Alston is charged, being an addict of marijuana,
8 there's no analogous statute. The government couldn't find
9 one that said that pre-founding era there was a prohibition on
10 folks from possessing firearms while using or being addicted
11 to marijuana. But they cite that, well, we can't really look
12 at marijuana because drug use is different now, things are
13 different, and things have changed. We had opiates back then.
14 We had cocaine back then.

15 What really is happening here, and I think this is
16 quite frankly the genius of the opinion, is there's a
17 recognition that from your standpoint the decision as to who
18 gets their rights -- I mean, we're talking constitutional
19 rights -- restricted falls on you. So let's make this burden
20 easier. Get rid of the means; get rid of the ends; get back
21 to what's really here. And it doesn't mean that you toss it
22 all to the dustbin. It does mean that those are things that
23 you got to factor within the analysis ultimately to get to the
24 conclusion. But when we start asking ourselves the threshold
25 questions, who does this apply to? Certainly will apply to

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1 Mr. Alston. Second Amendment applies that. There's no
2 statement that he has surrendered his Second Amendment rights
3 or has done anything like commit treason or any other felony
4 or any other constitutionally articulated thing that citizens
5 can do to renounce their rights. He hasn't done any of those
6 things. So we know this applies to him.

7 Then the next step is pretty simple. The two
8 statutes which he's she's been charged with, is there an
9 analogous statute? Felon in possession? There's analogous
10 statutes. We've seen those. Those are cited not only within
11 this brief by the Department of Justice, but many others. But
12 when we start asking ourselves as to what's the analogous
13 statute for the possession by a marijuana addict, that's where
14 the how and why analysis from this Court comes into play.
15 Because then we take a look back and say, all right, under
16 Bruen, the question isn't that complicated; it's quite simple.
17 Was there an analogous statute? Was there something that said
18 back then we wanted to restrict certain people from being able
19 to get that right? Because we've already established it
20 applies to everybody, so we got to figure out who it is that
21 it doesn't apply to. That's not that difficult of an analysis
22 to make once you start looking at these things from the Bruen
23 analysis, because now it's a question of, all right, what's
24 the pre-Second Amendment discussion and analysis. This isn't
25 that complicated because Your Honor's already figured it out,

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1 because you asked the question which is always on my mind,
2 which is we talk about law-abiding all day, but if someone has
3 been speeding, whether they've been caught or not, we all
4 would say that that person is not law-abiding. I feel like
5 that's an argument that even the Supreme Court recognized when
6 it was using the term "law-abiding", which is why they didn't
7 explicitly say law-abiding means X, Y, or Z. What they were
8 doing was they were saying, yes, we understand that there's
9 going to be restrictions, but those restrictions need to be
10 viewed from the historical lens of what existed in the pre-
11 Second Amendment era. That's the only distinction.

12 And we all have the fear of things going really bad.
13 But that is a fear that ultimately has been entrusted to
14 Congress, state legislatures to try to address. Because the
15 one thing that everybody keeps forgetting is that you can
16 amend the Second Amendment. We did it with alcohol, then we
17 undid it with alcohol. It can be done. This isn't a problem
18 without solution. What we are saying is that the solution is
19 something that's already been written. And now that we're
20 basically going through the analysis that is as textural as it
21 gets, the question is, did this statute exist prior to the
22 adoption of the Second Amendment? And the historical record
23 shows that the adoption of marijuana as a drug for the
24 purposes of being an addiction, that's not there.

25 THE COURT: I mean, so what we talked about was the

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1 mental illness prohibitions and some limitations on the
2 ability of those who are intoxicated to use or possess
3 firearms, right? And those get to issues of capacity, right?
4 You don't have the capacity to do this, and so we're not going
5 to let you. And if that's the question, why is Congress
6 not -- if they were regulating people's capacity to possess
7 firearms and use firearms in the early days of our country,
8 then why does Congress today not have the ability to regulate
9 what it views to be people who lack the capacity to
10 appropriately use and possess firearms?

11 MR. GRAY: I'll take that as kind of a two-step, Your
12 Honor, if you don't mind. So with regard to the issue of the
13 capacity issue, jurisprudence since the common law has come to
14 recognize that there are some folks who, because of their
15 mental status, are not going to be subject to all of the
16 rights that everybody else would get. And it's not because we
17 don't like them. It isn't because they're -- as we had in the
18 late 1700s with Catholics. It is because we have found that
19 based upon their ability to make recent decisions, that person
20 is incompetent. But there's been no argument that what's
21 taking place here is the coverage of someone who is
22 incompetent.

23 What we have here is we've identified that there's a
24 certain group of people that we don't want to have the right
25 to possess a firearm. So we're going to figure out how to

Colloquy

1 write the statutory language to get them there. And I'll be
2 the first person to tell you -- and I know these words will
3 come back to haunt me one day -- the idea that the logic that
4 came out of Bruen when it first struck me was a little jarring
5 because the first thing I said was, wow, this essentially kind
6 of scrubs the mat and makes every statute that covers guns or
7 the regulation of firearms -- it makes it all subject to a
8 challenge. But I think what was ultimately said by the court
9 was what's really at stake here is whether or not a person's
10 Second Amendment right, which they have, can be infringed
11 upon, even as the government says, for a little bit. And the
12 answer to that was categorically no. And we've seen this walk
13 from Heller to Bruen to other cases, and that is where we
14 stand with this.

15 I do this, Your Honor, to say it in a simplistic
16 manner, because I know that when we are looking at the nuances
17 of this, it can become quite complicated. And I think that's
18 why the means-ends analysis is problematic, because it creates
19 those nuances that ultimately get us to various areas that
20 take us further and further and further away from the Bruen
21 analysis, for example, the government's argument with regard
22 to an addiction. One, we have no evidence that there was an
23 addiction. Second, we know right now that when it comes to
24 the issue of lawfulness, North Carolina is debating whether or
25 not marijuana use as a medical device is lawful.

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1 THE COURT: Right.

2 MR. GRAY: We know thirty-six other states have
3 already said that it's lawful.

4 THE COURT: I mean, that's all well and good for
5 those states. I don't think it's really relevant to the
6 federal question here. Congress has not seen it appropriate
7 to undo this yet. And also, I mean, I think we're looking at
8 why did Congress enact this, what was the understanding at the
9 time they enacted this. And for better or for worse, that may
10 not be today's understanding of it. But I guess my point was,
11 if Congress has the power -- if the Second Amendment allows
12 Congress the power to regulate capacity -- of whether people
13 of a certain capacity can possess firearms, and it was
14 allowing it to do that in the 1790s, why is that -- why is
15 Congress not able to do that in the modern day?

16 MR. GRAY: I think they can, as long as they're
17 looking at it from the standpoint of what was there in the
18 1790s. If you want to do it otherwise, amend the Second
19 Amendment.

20 THE COURT: Right. And I -- the point I mentioned is
21 a lot of this is, what is the level of generality at which we
22 look at these practices and the analogy in a logical reasoning
23 we have to engage in. And so I think that's one of the
24 challenges here, to figure out exactly how analogous something
25 needs to be. Because again, we could -- you can draw -- you

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1 can have a very broad analogy of the founding era they
2 regulated anybody they considered dangerous to possess a
3 firearm, and define that in a broad way, and that would -- if
4 you accept that, it allows Congress now to regulate people in
5 a broad way anyone it finds dangerous. But that's probably an
6 exception that follows the rule and not one that I think the
7 Supreme Court would be comfortable with. So I've got to find
8 the right level of analogy here to get this straightened out.

9 MR. GRAY: Exactly, Your Honor. That's the how and
10 why that's discussed in Bruen. And what we're arguing is that
11 the right level of analogy is actually the statutes that we
12 put forth in pages 16 and 15 of our brief, which is they
13 restricted the person who was intoxicated from using the
14 firearm. That is the how and why right there. We don't have
15 that in this case. So when it comes to the question of
16 whether it's unconstitutional as applied or just facially,
17 those two answers -- those two questions are answered when we
18 take a look at that line of questioning. The how and why is
19 where's your analysis, where's your analogy. It's right
20 there.

21 THE COURT: So on this point, I mean, Justice
22 Kavanaugh's concurrence, that the Chief Justice joined, talked
23 in detail about not questioning the validity of these shall
24 issue regimes where you have to submit to certain -- answer
25 certain questions, the stated go -- some training and all

Colloquy

1 that. Why does that not give some weight to the argument that
2 there can be these sort of restrictions on who can possess a
3 firearm?

4 MR. GRAY: I think, Your Honor, that is much more
5 as -- for lack of a better phrase, that's a narrow application
6 based upon the fact that on Bruen, that's the application of
7 people who were like, hey, I want to be able to apply for this
8 gun. That's separate and apart and I think factually
9 distinctive from a statute that says simply because you are
10 under indictment, without explanation as to the nature of the
11 danger that occurs with that, you are prohibited from
12 exercising a Second Amendment right. You are an addict. Now,
13 we don't know whether or not your addiction is any more akin
14 to being an alcoholic or whether it's been akin to a crack
15 head, but because we've said it, we're taking away your Second
16 Amendment rights. And I think the real persistent threat from
17 Heller to Bruen is you can't just take away rights that way
18 that are embedded within the Second Amendment.

19 THE COURT: Well, that -- is there any other point
20 you want to make on 922(g)(3)? Okay.

21 MR. GRAY: No, Your Honor. I'll turn my attention
22 now just briefly to covering -- because I don't want to rehash
23 every argument that we've argued within our brief, but I do
24 want to turn our attention to the issue of -- to that
25 historical analysis. And once again, we've noted that if you

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1 want to take a look at the historical analysis, the provisions
2 are there. And those are restrictions on somebody who is
3 either drunk or intoxicated and that subsequent use of the
4 firearm or subsequent going into the woods, as one of the
5 statutes said. But when we take a look at that from the
6 historical context, that, I think, is our analogy. It isn't
7 the mysterious trying to analogize marijuana to alcohol. I
8 think what we have to say is, was there the ability to
9 legislate for that? There was. They didn't. Your Honor, the
10 Court asked a great question about the seventy-five-mile-an-
11 hour question, if you're speeding seventy-five miles an hour
12 whether or not that would take him outside of law-abiding.
13 And I do think that when it comes to the question of the law-
14 abiding principle, the question really comes down to the real
15 issue of does he fit within the definition of all Americans?
16 Because that's ultimately the standard that was articulated by
17 the court in Bruen.

18 When it comes to the issue of whether or not his
19 conduct needs to be evaluated, the conduct is possession of
20 the firearms. And even the restrictions that are temporary
21 have a problem -- are problematic when we look at the
22 restriction of somebody's Second Amendment rights.

23 THE COURT: But the government talked about, I guess
24 on both points, but it's perhaps more relevant on 922(n),
25 which is why I'd like to spend a little time talking about,

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1 but this is a temporary restriction and thus not all that
2 problematic. Why is that -- why do you disagree -- I mean, I
3 understand it's a restriction of his rights, undoubtedly. Why
4 is it that sort of temporary restriction akin to a time,
5 place, and manner restriction of First Amendment -- I mean, I
6 know there's a difference. But I mean, you can restrict these
7 rights in certain ways under certain circumstances. So why is
8 that temporary restriction while under indictment of receipt
9 not permissible?

10 MR. GRAY: To speak specifically with regard to the
11 while under indictment, Your Honor, the government made a lot
12 of statement about this is -- we're following a criminal
13 process where the prosecutor gets up and presents evidence.
14 But in North Carolina, you don't even have to have a
15 prosecutor in a room in order to get something through a grand
16 jury. Many times what you have is just a cop that shows up,
17 goes to the grand jury. There'll be something that will go
18 forward as an indictment, and you'll have a prosecutor won't
19 even know it until after the fact, which is why we get a lot
20 of these dismissals after the fact as well.

21 But Your Honor, I tell you -- I use that just to help
22 illustrate that when we look at the issue of the temporary
23 restriction. Under that regime in North Carolina, somebody
24 can go in, get an indictment, and they don't get into court
25 for years. We're not talking about a minor inconvenience.

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1 We're talking about where somebody can be under the guise of
2 an indictment four, five years. That's not a minor or a
3 temporary restriction. That's a deprivation. When we start
4 talking about those sort of things, we're not talking about
5 just the temporal load, because I'm sure most people will say,
6 listen, being deprived of my constitutional rights for even a
7 minute is problematic. But when we look at it in effect, the
8 problem that we have here is under indictment in North
9 Carolina means that you could be effectively waiting for
10 years. And unfortunately, and this is why we responded to the
11 Court's query with 9 -- under 925 -- or 922 why the
12 application for reinstatement is important is he doesn't even
13 get an opportunity to ask for that right back. There's no
14 avenue for him to be able to get a right back that's been
15 suspended for six months or a year or two years. He's just
16 stuck without a constitutional right that applies to all
17 Americans, all on the mere accusation -- it's not a proof.
18 There's been no proof beyond a reasonable doubt -- all based
19 upon a mere accusation. And that is problematic, Your Honor.

20 THE COURT: So I mean, that accusation -- I mean, I
21 agree with you that it's black letter basic criminal law,
22 right, an indictment is an accusation supported by probable
23 cause. But that accusation in a lot of ways fundamentally
24 changes the citizen's relationship with their government. And
25 what I've heard the government tell me is that a bunch of our

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1 rights are restricted once we are under indictment. And
2 whatever the -- grand jury is there for a reason, and no
3 system is perfect, but the grand jury makes a decision either
4 in state or federal court to return an indictment, presumably
5 the defendant would have to know he's under indictment before
6 he's subject to criminal sanction here, but that results in
7 deprivation of many constitutional rights. And this Second
8 Amendment rights are just another one of those, and it's no
9 different; it was that way in various shapes and forms at the
10 time of the founding, so 922(n) poses no constitutional
11 problem. What's your response?

12 MR. GRAY: But there are a number of constitutional
13 rights that don't actually take effect until this process gets
14 started. Due process, right to remain silent. So to say that
15 some rights apply and some rights don't apply, I think we have
16 to really take a look at the larger context of the
17 application. But I think it's a little glib to say that it's
18 okay to deprive Americans of their rights, even for a little
19 bit, simply because we feel like it's okay. And I think
20 that's a thread that's also within a lot of what we're seeing
21 in this discussion with regard to Heller and Bruen.

22 THE COURT: So I mean, the time of the founding, I
23 mean, there were -- if you were arrested, once you were
24 indicted, you could be arrested and all of that, and you may
25 or may not have had a right to bail. And the other -- another

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1 argument is that the -- any right to bail is one of
2 legislative grace, not one of constitutional mandate. And
3 thus, since the legislature didn't have to even let you out of
4 jail, where presumably it would seem to make sense you can't
5 have a gun, today's legislature is saying once you're under
6 indictment, you don't get to have a gun is reasonably close
7 enough of a match that it's okay. Why is that not the case?

8 MR. GRAY: Well, I think when we start taking a look
9 at those issues of legislative grace, I think in the end,
10 ultimately what's taking place here is these are restrictions
11 that are coming from the bench with regard to a person's,
12 quite frankly, decision. You can give up your guns or you can
13 go to prison; which one do you want? Now, I think, and this
14 Court is more than familiar with it, there have been instances
15 where there have been people under indictment federally where
16 the government has asked for that person to be able to use a
17 firearm or possess a firearm -- not use, possess a firearm.
18 That was accepted by the court and ultimately ruled upon by
19 the court. To me, this is not a big, indistinguishable fact,
20 because what we're really dealing with here is an
21 interpretation of a lawful statute that the courts get a
22 chance to make their means-end analysis on. But when we start
23 taking a look at things such as our Second Amendment rights,
24 the court's already said means-ends is not going to work
25 anymore; let's take that analysis to something simpler.

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1 THE COURT: I guess what I want to get at, though, is
2 I mentioned earlier, look, what we're talking about here is
3 governmental power, what is the power of the government in
4 this space. And it appears that in the context of what
5 happens to you after you're arrested, you don't have a right
6 to bond and all that, and your right to be arrested -- or the
7 ability to arrest you and deprive you of your liberty exists
8 more or less at the moment of indictment. Obviously, a little
9 paperwork needs to be done, but generally you are then subject
10 to arrest and restriction on your rights. And so why -- if
11 the government has the power to deprive you of your liberty
12 effectively at the moment of indictment, why does it also not
13 have the power at that moment of indictment to restrict your
14 Second Amendment rights? If it could take away all of your
15 liberty, why can't it take away a smaller portion of it?

16 MR. GRAY: And that is the question, Your Honor. The
17 question really comes down to what extent can the government
18 take away somebody's rights. And ultimately, when it came to
19 the issue of that Second Amendment right, we've seen an
20 evolution and how we've interpreted that.

21 And I think when we take a look at the Carter
22 decision from the Fourth Circuit that we've cited, that is a
23 great illustration of that tension. It's the reason why the
24 Fourth Circuit punted on the question, because the real answer
25 is we didn't know until we got a clear analysis chain in order

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1 to make that decision. And that was done in Bruen. And
2 that's why I started off this argument by saying we've all
3 gone through and read a number of cases where we've got to sit
4 there and pull out and divine and interpret and hold up
5 against the light to figure out what the court is saying. But
6 Bruen actually made this one pretty simple. Is this a right
7 that applies to everybody? If it is, we've got to be really
8 conscious as a government to take away that right. The way
9 that we're going to exercise that consciousness is by taking a
10 look and seeing what existed prior. And that's why the burden
11 is on the government to show that what they're doing now
12 looked like something they did back then. This is an
13 uncomfortable position for the government. I completely
14 understand that. Because now it is really in a position where
15 it's got to shift its thought process away from means-end to
16 something that's, quite frankly, a lot more bright line.

17 But that is what we have. We have the bright line.
18 And we would ask the Court in this instance to examine the
19 issue, to examine the facts and our arguments, and ultimately
20 determine that under this line of analysis, under the
21 examination of Bruen, Mr. Alston's rights have been violated,
22 his constitutional right to possess a firearm has been
23 violated, and that these two statutes are in violation of the
24 Second Amendment of the United States Constitution. Subject
25 to that, Your Honor, I'll take any other questions that you

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1 have.

2 THE COURT: Thank you.

3 I know we've been at this for a while, but Ms. Nokes,
4 I'll give you the opportunity to make any last comments or
5 responses to what Mr. Gray shared.

6 MS. NOKES: Sure, Your Honor. Thank you for giving
7 me that opportunity. Let me just push first on the shall
8 issue regimes. The Supreme Court made it clear that, "Nothing
9 in the analysis in Bruen" -- I think this is what the Court
10 was pushing on -- "should be interpreted to suggest the
11 unconstitutionality of the forty-three states shall issue
12 licensing regimes which often require applicants to undergo a
13 criminal background check and are designed to ensure only that
14 those bearing arms in the jurisdiction are, in fact, law-
15 abiding, responsible citizens." That's in Bruen note 9, page
16 2,138, quoting Heller. And then there's a similar provision
17 in the Kavanaugh concurrence saying that shall issue licensing
18 regimes are constitutionally permissible.

19 Defendant says that this is somehow narrow and
20 applies only to the law that the Bruen court was reviewing,
21 the New York law that said that the folks needed to have some
22 reason why they were going to have a gun and had to sort of
23 get that approved by New York before they could have a gun.
24 But that's just plain not what the opinion says. The opinion
25 says that nothing within it is meant to cast any doubt on

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1 these shall issue regimes. Why is that important in this
2 context? Well, many of those regimes actually restrict drug
3 users and those under felony indictment from possessing
4 firearms. So if the Supreme Court says, "Nothing in this
5 analysis is casting any doubt on those regimes," which do
6 include these same prohibitions, then the Bruen court has
7 spoken on that, at least by reference.

8 THE COURT: I'm not sure it's as open and shut as you
9 would propose there. I don't know that challenges are going
10 to be -- simply because the State has chosen to ask a question
11 on a shall issue license, the court will consider that a
12 closed matter. But that particular question is beyond the
13 scope of what we're doing here.

14 MS. NOKES: Sure, Your Honor. Thank you. With
15 respect to the fact that it can take years to resolve an
16 indictment, speedy trial -- we all have speedy trial rights;
17 that's part of the Constitution. And the fact that these
18 things take a long time doesn't change the fact that courts
19 can burden the other rights in the Bill of Rights, the Fourth
20 Amendment right, the First Amendment right, the Sixth
21 Amendment right. So again, it's logical that the Court could
22 burden a Second Amendment right for however long it takes to
23 get that indictment resolved.

24 Your Honor, I would also point again to the Bruen
25 opinion here now in the Alito concurrence stating on page --

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1 well, it's the second page of the Alito concurrence that in
2 that opinion -- in the opinion that was decided by Bruen, they
3 were holding that a state may not enforce a law that
4 effectively presents its law-abiding residents from carrying a
5 gun from this -- for this purpose. And that is all the court
6 decided. As the Court is well aware, throughout the opinion,
7 I think it's fourteen times, the court references law-abiding
8 citizens. It does speak about all Americans in another piece
9 of the opinion. But throughout the opinion, throughout the
10 concurring opinions, over and over and over again, it talks
11 about law-abiding citizens. So the government believes that
12 people who are not law-abiding do not have the same Second
13 Amendment protections as those who are.

14 One point with respect to the analogizing and the
15 historical context, if I'm hearing defendant correctly, he's
16 saying that there's no one-to-one analogy here in either
17 context, in the drug user context or in the receipt under
18 indictment context, and so that means that the modern day
19 statutes are unconstitutional. But that's just not what Bruen
20 says. Bruen asks us to do this difficult historical analysis,
21 to make these analogies that are broader in scope than just
22 looking at is there a law that looks the same as the law that
23 is in our modern day statute books? Well, if not, well, then
24 we got to throw it all out. That's not what Bruen tells us to
25 do. Bruen tells us to do this entire historical analysis, to

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1 look at the how and the why for how restrictions were put upon
2 people's Second Amendment rights back in the day, and to
3 consider whether the current modern-day statutes are
4 consistent with that history and tradition with the founders'
5 understanding. So just as the Second Amendment covers guns,
6 covers weapons that the founders could never have imagined, an
7 AR-15, for example, that the court may find is a legitimate
8 weapon, a legitimate tool of self-defense. I think we'd all
9 agree that at this point the Second Amendment covers those
10 types of weapons. We also have to look at the Second
11 Amendment as being flexible enough as incorporating that
12 analogy where we say, yes, muskets and AR-15s look really
13 different. Well, some of the statutes restricting firearms
14 rights look somewhat different than they look in today's
15 world. But the Second Amendment is flexible enough. The
16 Constitution is flexible enough to allow us to do that
17 historical analysis, to allow us to create these analogies,
18 and to understand why restrictions existed at the time of the
19 founding and how they relate to restrictions that exist now in
20 order to say that, yes, what exists now, what exists today
21 doesn't look like exactly what was on the books at the time,
22 but it is nonetheless consistent with the history and
23 tradition of firearms regulations in this country, and that
24 these statutes, for example, are thus constitutional.

25 THE COURT: Thank you, Counsel. Thank you for the

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1 briefing on this. It's a very complicated issue requiring
2 different kinds of research I think we're usually used to on
3 all of our fronts. I appreciate the work everyone's put into
4 it. I also appreciate it that one or perhaps both sides will
5 want to take up my decision with Judge Flanagan at some point,
6 so I'm going to endeavor to get this done in the next few
7 weeks so you all can move on from here. Certainly don't feel
8 obliged to object, but I understand one or both sides may be
9 dissatisfied with some or all of my decisions. So that will
10 take time, and I want to make sure this resolves relatively
11 quickly, so I'll endeavor to get this done as soon as
12 possible. But again, thank you all very much for your
13 briefing on this. I'll take it under advisement. We'll be in
14 recess.

15 THE CLERK: All rise. This Honorable Court stands in
16 recess.

17 (Court is adjourned)

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Dated this 24th day of June, 2023.

/s/


RACHEL WILEY, CDLT-251

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